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GREG REIFFEL CONSULTING
HUMAN RESOURCES & INDUSTRIAL RELATIONS

Employee Relations Newsletter

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Quote:

"Remember, this whole thing was stated by a mouse." – Walt Disney.

In this Edition

This edition provides three "bad news" cases for employees, and provides that policies alone do not protect businesses, but each case on its own merit should be considered. **Please ring me before** terminating an employee – this one phone call could save you $thousands.

Federal Court decides "concerns" for an employee's mental health an adverse action

This is a case where it could be described as patience is a virtue; and more importantly to seek advice before terminating an employee – including the contents of any termination letter. This is especially important for absences involving ill health. In this matter, the applicant was awarded $160,000. Legal costs will most likely be added to this award.

Banks behaving badly…again? Reinstatement ordered.

Yes, an employer's worst nightmare: an employee is dismissed and then the FWC orders reinstatement. In this matter the FWC found there was a valid reason for the dismissal, but the dismissal was unfair due to procedural failings. In particular, the FWC took swipe at the investigation process ("star chamber") and the e-training ("tick and flick" and "devoid of any academic rigour").

Maximum payout to employee sacked because of criminal record

This case is illustrative (to the extreme) of not only having in place a flexible criminal check policy but ensuring that it is applied with caution and (again), the punishment fits the crime. It is also rare for the FWC to award compensation that is the maximum allowable under the FWA.

Read on/…

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Federal Court decides "concerns" for an employee's mental health an adverse action

Robinson v Western Union Business Solutions (Australia) Pty Ltd. [2018] FCA 1913

This is a case where it could be described as patience is a virtue; and more importantly to seek advice before terminating an employee – including the contents of any termination letter. This is especially important for absences involving ill health. In this matter, the applicant was awarded $160,000. Legal costs will most likely be added to this award.

Mr Robinson was dismissed by his employer of four years and three months following an absence of seven months (three months being LWOP).

The Company had requested that Mr Robinson attend its psychiatrist for an "independent" report of when (and if) he can return to his employment, for which Mr Robinson replied that he was happy for the Company to speak to his treating GP, psychologist and psychiatrist. He did not attend to the appointments made by the Company on his behalf, ultimately being the reason, the Company used for his termination of employment. The termination letter stating:

> *"Given that you cannot give any indication as to when you will return to work, your unreasonable failure to cooperate with the Company's attempts to obtain up-to-date, specialist medical advice and in light of the Company's serious concerns about your capacity to return to work, the company has decided to terminate your employment. This termination will take effect on 8 May, and you will be paid two months' pay in lieu of notice plus accrued but untaken leave entitlements".*

The FCA, in this matter, did not rule on whether the Company's request that Mr Robinson attend a medical evaluation was lawful or otherwise, but focused on whether there was (a) an adverse action by the Company against Mr Robinson and (b) whether he had the capacity to fulfil the "inherent" requirements of his position.

It should be noted that the HR Manager was put under intense scrutiny by Mr Robinson's counsel – at one point being accused of lying.

The findings came down to:

- That Mr Robinson had a disability and that a disability "denotes both the condition and its manifestations" (ie the initial diagnosis of anxiety/depression **and** its related conditions equate to a disability).
- The "inherent requirements of the position were analysed as follows:

  > *"First, the inquiry is whether "because of [the person's] disability" he or she would be unable to carry out the inherent requirements of the particular employment. That is, the search is for a causal relationship between disability and being unable to carry out the inherent requirements of that employment. Secondly, the provision applies only if the person would be unable to carry out those requirements. No doubt inability must be assessed in a practical way but it is inability, not difficulty, that must be demonstrated. Thirdly, the requirements to which reference must be made are the 'inherent requirements of the particular employment'".*

- Ultimately the Court found that the "concerns" held by the Company was not sufficient to satisfy any test relating to the "inherent requirements of the position":

  > *"The effect of such an argument was that the moment a medical certificate was provided which stated that an employee was unfit to return to work in the foreseeable future, it necessarily followed that the employee could not satisfy the "inherent requirements" of his employment – namely his capacity to undertake any work at all".*

- Put simply, there was no factual evidence to show that Mr Robinson could not have returned to work sometime in the future.

In turning to penalty, the Court cited another case:

> *"No less importantly, whereas criminal penalties import notions of retribution and rehabilitation, the purpose of a civil penalty, as French J explained in Trade Practices Commission v CSR Ltd [[1991] ATPR 41-076 at 52,152], is primarily if not wholly protective in promoting the public interest in compliance:*
>
> > *'Punishment for breaches of the criminal law traditionally involves three elements: deterrence, both general and individual, retribution and rehabilitation. Neither retribution nor rehabilitation,* ***within the sense of the Old and New Testament moralities that imbue much of our criminal law****, have any part to play in economic regulation of the kind contemplated by Pt IV [of the Trade Practices Act] … The principal, and I think probably the only, object of the penalties imposed by s 76 is to attempt to put a price on contravention that is sufficiently high to deter repetition by the contravenor and by others who might be tempted to contravene the Act.'"* [Emphasis added].

The Court ordering compensation of $140,000 plus a penalty to Mr Robinson of $20,000. The matter of costs has been raised but not resolved.

Banks behaving badly…again? Reinstatement ordered.

Kefeng Deng v Westpac Banking Corporation. [2018] FWC 7334 (U2018/5696).

Yes, an employer's worst nightmare: an employee is dismissed and then the FWC orders reinstatement. In this matter the FWC found there was a valid reason for the dismissal, but the dismissal was unfair due to procedural failings. In particular, the FWC took swipe at the investigation process ("star chamber") and the e-training ("tick and flick" and "devoid of any academic rigour").

Mr Deng was employed by Westpac Banking Corporation between 2 October 2012 and 15 May 2018. At the time of his termination, the Applicant was employed as a Mobile Lending Manager at St George Bank.

The reasons provided for the termination were that Mr Deng sent business emails to his personal ("unsecured") email address, in breach of the Bank's policies and other irregularities in not following lending policies. The termination letter also came with a "sting in the tail":

> ***"Australian Bankers' Association Industry Conduct Background Check Protocol (Protocol)***
>
> *Please be aware that if you apply for future employment at other banks or financial institutions that have subscribed to the Protocol, you will be asked to provide consent for Westpac to complete a conduct background check about you. This may mean disclosing the fact that your employment has been terminated for misconduct to your prospective employer. In these circumstances, Westpac will have to provide the details of the category of misconduct as defined under the Protocol. Please also note that as part of our obligations under the Protocol Westpac will keep a record of this information…"*

In this matter, the FWC focused on whether Mr Deng received his statutory entitlement to a "fair go", it is necessary to determine whether the allegations made against the Applicant have been substantiated and whether the disciplinary penalty of dismissal was an appropriate outcome. That is, whether the punishment fit the crime.

The FWC cited *King v Freshmore (Vic) Pty Ltd*, a Full Bench of the Australian Industrial Relations Commission held:

> *"When a reason for a termination is based on the conduct of the employee, the Commission must…determine whether the alleged conduct took place and what it involved.*
>
> *"The question of whether the alleged conduct took place and what it involved is to be determined by the Commission on the basis of the evidence in the proceedings before it. The test is not whether the employer believed, on reasonable grounds after sufficient enquiry, that the employee was guilty of the conduct which resulted in termination."*

Of the eight allegations (or reasons) for the Bank dismissing Mr Deng, the FWC found only one to be valid, being the sending of the business emails to his private email address:

> *"The Applicant's action in sending the personal information of two of the Respondent's customers to his personal email is undeniably reprehensible".*

However, the FWC decided:

> *"I can see no personal benefit for the Applicant in deliberately acting in contravention of this policy. I am prepared to accept the evidence of the Applicant that, due to* ***the majority of the Applicant's customers being of Chinese*** *origin, a number of his* ***clients had a mistrust in the banking system*** *and would only send this information to the Applicant's private account".* [Emphasis added].

The FWC was extremely critical of the Bank's investigation process, which was found to be:

> *"I find that the Respondent has not proffered the Applicant the requisite level of procedural fairness. The process followed by the Respondent* ***resembles that of a Star Chamber****. The investigation process was flawed. Ms King failed to follow up on any of the explanations provided by the Applicant. The investigation by Ms Quintal was simply non-existent. Ms Quintal simply adopted Ms King's report. For the Respondent to traverse between the disciplinary interview to the "Intent to Terminate Employment" interview without the Respondent even trying to corroborate the Applicant's version of events was unjust".* [Emphasis added].
>
> *"….The investigation, at best, appears to be nothing more than the opinions of Ms King. There has been not a single attempt to corroborate the responses of the Applicant by either Ms King or Ms Quintal. Not a single customer was contacted to ascertain the facts".*

The FWC was also critical that the Bank did not call a management witness with an operational expertise or function was called to give evidence

And for those of you that are fans of e-training, the FWC added (referencing the training relied upon to terminate Mr Deng):

> *"I have taken into account the training regime of the Respondent. The overwhelming majority of the training is computer-based and self-testing. The training does not appear to have any element of academic extension or rigour and can be completed, in some instances, in a matter of minutes. For example, the Respondent's Attestation training module took the Applicant 3 minutes and 42 seconds in January 2017, 33 seconds in June 2017, 7 minutes and 9 seconds in November 2017 and 2 minutes and 35 seconds in April 2018. Having previously worked in vocational training for nearly 20 years, I question the actual capacity of this style of "tick and flick" training to embed the necessary skills and competencies into the employee operating the computer keyboard".*

Also, the FWC found that providing Mr Deng with only one day to respond to the "Intent to Terminate Employment" letter was also lacking in procedural fairness.

> *"The provision of a six-page letter setting out the eight allegations in detail to the Applicant was a positive step in the process by the Respondent. However, requiring a response within 24 hours is not pragmatic and blatantly unfair. It would not have been feasible for the Applicant to seek legal advice*

and provide a response in this timeframe. The Applicant was entitled to review all of the relevant emails, policies and accusations, seek legal advice, seek corroborative statements from his customers and provide a considered response. This denial of natural justice cannot be condoned. As a result, I find the Applicant's termination to be unreasonable".

The remedy

In considering the remedy the FWC took into account that Mr Deng would be unlikely to find other employment in the financial industry due to the unintended consequences of the Banking Royal commission requirements.

The FWC ordering that Mr Deng:

- Be reinstated to his former position with the Respondent.
- Continuity of employment with the Respondent.
- Be paid 10 weeks' pay (14 weeks' pay being deducted due to the misconduct of the Applicant in sending customers' personal information to his private email address).

Maximum payout to employee sacked because of criminal record

KB v The Agency [2018] FWC 6937 (U2018/6543).

This case is illustrative (to the extreme) of not only having in place a flexible criminal check policy but ensuring that it is applied with caution and (again), the punishment fits the crime. It is also rare for the FWC to award compensation that is the maximum allowable under the FWA.

The FWC decided to ensure the anonymity of the participants due to the sensitive nature of the matter.

This decision concerns the merits of KB's dismissal by the Agency which amongst other things provides job placement services nationally for recipients of various Commonwealth Government benefits. KB was a Job Placement Officer.

The reasons given to KB at the time she was dismissed are twofold; one that she was not truthful to her employer about a conviction in 2014 for Centrelink fraud and two that the work she performed, being in performance of a Commonwealth of Australia Deed meant that it was untenable for the company to continue to employ her. The fact of KB's 2014 conviction had only been learned of by the Respondent in April 2018.

The Agency, at the hearing, conceded that the Commonwealth of Australia Deed did not require that a Job Placement Officer was inconsistent with the Deed (as it only applied to senior personnel), however the Agency maintained that the Applicant was not truthful with them about her 2014 conviction; that she had a positive obligation to inform her employer about the conviction; that she failed in her obligation to inform her employer about the convictions when it asked her to complete a police check; and that she delayed returning the information necessary for the police check to be undertaken.

The Agency takes these matters together – a failure to inform, and her failure to submit to a police check – as an untruthfulness or a lack of candour on the part of KB, submitting that those matters together justify her dismissal.

KB:

- Is 51 years of age and has had a profoundly challenging adult life. She is the mother of two adult children and the stepmother of another. In 2004, when living in Perth, her husband took his own life. Prior to her husband's death the Applicant had experienced acts of domestic violence from him.
- The death of her husband precipitated further very significant events. After moving to Melbourne she lost the custody of her stepdaughter and had an extended battle with her husband's life insurer which took years to resolve.

- KB's relocation to Melbourne was not easy, with its difficulty exacerbated by the deterioration in her physical and mental health as well as the dispute she was engaged in with her husband's life insurer. During this period she was diagnosed with severe depression. Because of the dispute and other factors she was without meaningful financial support and needed to utilise the social security benefits accessible through Centrelink. She experienced psychological distress and trauma as a result of her circumstances.
- In 2011 she found casual employment with one of the companies in the Agency's Group, and over a period of time her hours increased to 30 to 35 hours per week.
- Between 2011 and 2012 KB neglected to accurately report her fluctuating income to Centrelink. By that time she was ineligible for either some or all of the payments she received from Centrelink.
- On 21 August 2014 KB attended the Ringwood Magistrate's Court and was convicted of two counts of obtaining financial advantage and fined $3000 and to pay to Centrelink $26,862.26.
- [14] After being convicted, in 2015 KB was offered and accepted full-time employment with the Agency as a Job Placement Officer.
- On 1 July 2015, the Applicant attended an induction meeting concerning the new Deed. Her recollection of one of the things said at the meeting conducted by VC included that there would be zero tolerance on the part of the company for anyone with a criminal conviction and that if any employees had a criminal conviction, they would no longer have a position with the Respondent.
- The Applicant's evidence put forth that she believed this policy to be 'severe as it did not take into account factors including the lapse of time of the criminal convictions or whether the conviction has any impact or was related to the actual work performed'.

As put by the FWC:

> *"…The Agency terminated KB at its initiative pursuant to a discretion it had about the situation. It could have chosen other avenues, but did not. While the employer may have perceived an inherent requirement to no longer be fulfilled, it is doubtful first that there was such an inherent requirement and secondly that the Agency ever turned its mind to whether alternatives existed to termination of employment.*
>
> *"In the ordinary course KB's tardiness in responding to the Respondent's requests for consent for a police check or, if she was obliged to do so, to respond and to positively appraise her employer of changes in her legal status, may be sufficient for her to be warned about the consequences of future transgressions, but they are insufficient to be found to be the basis of a sound, defensible and well-founded decision for dismissal. There is no evidence that her explanation for non-compliance was other than reasonable; that she would have other convictions or blemishes to be found out; or that she would be unlikely to heed the term of a warning".*

The FWC finding:

> *"After considering each of the criteria within s.387, I find that KB's dismissal was harsh, in that the decision to dismiss her was disproportionate to her conduct; that it was unjust, since the Respondent's decision was predicated upon false or faulty reasoning about its obligations to the Commonwealth; and it was unreasonable, since the Respondent did not sufficiently consider KB's explanation for her conduct".*

In turning to the loss of "trust and confidence" as argued by the Agency, the FWC found:

> *"The assertions made by the Respondent about its loss of trust and confidence in KB are less likely to be objectively ascertainable as showing irreparable damage or an inability to allow a viable and productive future working relationship than they are to do either with its* ***embarrassment about having to take back someone it has dismissed and then explain that to its contractual party****, the Commonwealth of Australia. The Respondent has failed to seriously address the meaning of the provisions of the Deed to which it points as some sort of prohibition on the continuation of KB's employment or the application of those provisions to her particular circumstances".*
>
> *"Against the possibility of reinstatement being appropriate, it may be said that the evidence would*

lead to the conclusion KB knew what she was doing when she kept information from her employer. While suffering under some level of embarrassment and personal distress about the fact of the convictions, her employer's zero tolerance of convicted employees, and the likely outcome of her employer's knowledge of her circumstances, those matters do not adequately explain why there was a conscious decision on her part not to reveal the information until it became absolutely clear there was no alternative but to do so. Whether or not the Policies had application to her is not necessarily the point when it comes to considering the appropriateness of reinstatement as a remedy in these proceedings. She did not say to the Agency at the time something along the lines of ***"I choose not to respond because your policy does not apply to me",*** *rather she simply did not respond to what at the time she likely regarded as a proper enquiry from her employer*

"The fact that KB chose to hide information from her employer, by actively not disclosing it and that this was on several occasions, leans against reinstatement being appropriate. ***Her actions amount in retrospect to a signal from her that she did not trust her employer with the information".*** [Emphasis added].

In concluding that compensation was more appropriate, the FWC commented:

"In this case, the Commission is faced with an Applicant who is 51 years of age, who has worked for the direct Respondent for five years and for the wider Group for a further two years. The Applicant enjoyed her work; it enabled her to 'do a job that I loved and was making a difference'".

Compensation

"*In calculating compensation, Haigh v Bradken Resources makes it plain that any deductions from compensation to be ordered are to be made prior to the application of the compensation cap. With my assessment of the anticipated period of employment being no less than two years and possibly more, any deductions to be made from the compensation order would leave the compensation above the compensation cap. My calculation of these matters is as follows:*

Anticipated period of employment	*24 months*
1/3 deduction for misconduct	*– 8 months*
25 % deduction for contingencies	*– 6 months*
5% deduction for mitigation	*– 1.2 months*
TOTAL REMAINDER	***8.8 MONTHS***

"In KB's circumstances the applicable compensation cap is the total amount of remuneration she received during the 26 weeks immediately before the dismissal…Since the calculated compensation is above the compensation cap, my order will be for a payment equivalent to the compensation cap.

"My order for compensation will be for KB to be paid the total amounts, including superannuation, which she received during the 26 weeks immediately before the dismissal. Such compensation as is required to be paid to KB will be taxed according to law".

Until next time…

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